Program Research Project

THE NEUTRALITY ACT: A TOOL TO IMPLEMENT POLICY

BY

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Historically, the United States has maintained a national security policy that no one may conduct or initiate from the United States any military expedition against any foreign nation or people with whom the United States is at peace. The objective of the policy is to prevent entanglements between the United States and foreign powers, or with the relations between a nation-state and its insurgent people, in such a way that could lead the United States into conflict. This project examines the legal framework enacted to implement this strategy. The research reveals that agreements formed and actions taken in the United States to effect a military or naval expedition against a foreign state with which the United States is at peace, or to murder, kidnap or maim persons in a foreign country, or to damage or destroy property located in and owned by a government with which the United States is at peace, are criminal violations of United States law. The United States is "at peace" with other countries so long as there is no declared state of war nor open and notorious military action being waged between the United States and that country.

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ABSTRACT

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THE NEUTRALITY ACT: A TOOL TO IMPLEMENT POLICY

From the earliest days of the United States it has been the policy of this country to prohibit private military or naval expeditions or enterprises planned, initiated or supported against nation-states or peoples with whom the United States is at peace.[1] The purpose behind the policy is now, and always has been, to prevent private parties from taking actions on their own initiative and for their own purposes which actions have the effect of embroiling the United States in conflicts with the nations against whom the private parties take action.[2]

Residents of the United States engaging in private military expeditions against foreign countries is not an issue of international law.[3] It strictly is a matter of domestic foreign policy and domestic law.[4] If unaddressed, it could become a matter of international law, subject to United Nations sanctions, if the community of nations concludes that military intervention into the internal affairs of a foreign country was in fact state-sponsored by the United States. This is why it is important for the United States to demonstrate its due diligence to preclude private military actions against foreign nations.

A nation is expected to be able to exercise dominion and control over its sovereign territory and citizens.[5] A nation has an "international responsibility of government to prevent its territory from being used as a base for launching terrorist attacks against other countries."[6] To the extent that a private organization uses the territory of a nation-state, and receives the protection of that nation's sovereignty to plan and organize military expeditions against another nation, an inference can be raised that the military operation either is

sponsored by, or has at least the tacit approval of, the nation whose sovereign territory is being used to mount the expedition.[7] The private venture has the potential to be seen as an act of war, sufficient to bring the host nation into armed conflict, or at least diplomatic difficulty, with the nation where the military action takes place.[8]

There are a number of nations in the world today which are either unwilling or unable to prevent terrorists and other private actors from using their territory to organize, plan, train, supply and initiate military style operations against the sovereignty and peoples of other nations. These include Sudan, Afghanistan, Algeria, the Palestinian Territories in Gaza and the West Bank, Lebanon, Syria, Iran and Pakistan.[9] In several of these instances, the prevailing world view is that the host nation affirmatively is sponsoring the terrorist and military actions. All of those nations are in diplomatic difficulties with the nations which are victimized by the groups using their territory, and in some instances engaged in actual hostilities with the victimized nation. See, for instance, United States military intervention in Iraq and Afghanistan, or Israeli intervention in Lebanon.

The object of American neutrality laws is to prevent the appearance that the United States either sponsors or acquiesces in terrorist or military expeditions against the sovereign territory and people of other nations.

> The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent upon the existence of such state of belligerency.[10]

The United States historically has been very aggressive in ensuring that private groups do not use the United States as a staging area for military expeditions against the governments of other countries.[11]

The legal framework to implement American policy in this regard is contained primarily in Chapter 45, of Title 18, United States Code, §§ 951-970. The Neutrality Act, 18 U.S.C. 960, prohibits any military or naval expedition which is planned, supported or initiated from the United States against any nation with whom the United States is at peace.[12] A violation of the Neutrality Act is a felony, for which the maximum penalty is imprisonment for three years and a fine of $250,000.[13] The federal conspiracy statute prohibits any agreement to violate the Neutrality Act, or any other provision of federal law, so long as at least one overt act to effect the violation of federal law takes place somewhere within the United States.[14] It is not necessary that a military expedition actually be mounted against a foreign country. It only is necessary to form the agreement to engage in such an enterprise and take a single overt act to accomplish the mission.[15]

The predecessor to present day § 960 originally came into existence in 1794 upon the recommendation of President George Washington on December 13, 1793 during his annual report to Congress,[16] which today is known as the President's State of the Union address:

> Where individuals shall, within the United States, array themselves in hostility against any of the powers at war, or enter upon military expeditions or enterprises within the jurisdiction of the United States, …, these offenses cannot receive too early and close an attention, and require prompt and decisive remedies.[17]

The original statute was passed on June 5, 1794, and is almost verbatim with the current wording of §960.[18] Of importance, it incorporated the language "with whom the United States is at peace."[19] The original statute was triggered by a protest of the French government that the United States was not taking steps to prevent raids on French government assets by Americans.[20]

In addition to Title 18, United States Code, § 960, and conspiracy to violate § 960, it also is a violation of federal law to conspire to commit an act outside of the United States which would constitute murder, kidnapping or maiming if any of the conspirators commits an act in furtherance of the conspiracy within the United States. See Title 18, United States Code, § 956(a).[21] Murder is defined as the unlawful killing of a human being with malice aforethought.[22]

The elements of a violation of § 956(a) are (1) agreement between two or more persons to commit murder (or kidnapping or mayhem) in a foreign country; (2) defendant joined the agreement with the intent to effectuate the agreement; (3) one of the co-conspirators committed at least one overt act in furtherance of the object of the conspiracy, and (4) at least one of the co-conspirators was in the United States when the agreement was made, or accomplished one overt act within the United States.[23]

This is an incredibly broad statute, designed to include any murder, kidnap-ping or seriously disfiguring injury which results from a plan to accomplish that result in any foreign country for any reason whatsoever, so long as at least one overt act in furtherance of the agreement to murder, kidnap or maim took

place within the United States. The agreement itself doesn't need to be formed in the United States so long as there is at least one overt act performed here. The essence of the crime is the agreement to kill, kidnap or maim in a foreign country.[24] No killing, kidnapping or maiming need ever take place. The country where the event is to take place need not be a country with which the United States is at peace.

The purpose of the murder, kidnapping or maiming need not have anything to do with national security or international relations. In United States v. Wharton,[25] the defendant entered into a plan in Louisiana to defraud an insurance company by staging the fake death of his wife and collecting the insurance proceeds. The fake death was to take place on a vacation in Haiti, from which the wife would go into hiding in the Caribbean. Apparently there was a change in plans and the wife actually was murdered in Haiti. The defendant was convicted of a violation of § 956(a) and his conviction was upheld on appeal.[26]

Title 18, United States Code, § 956(a) implements the strategy to prevent private military expeditions by specifically prohibiting and punishing the inevitable consequences of a private military or naval expedition or enterprise. In almost every instance, a private military enterprise against a foreign government would result in the death of soldiers and government officials under circumstances that would constitute murder, or the type of grievous, seriously disfiguring injury that constitutes mayhem. In addition, insurgent-type military actions frequently involve kidnappings. There is no military purpose defense to the killing, maiming

or kidnapping in this instance because the death or injury results from private action, not a state sponsored military expedition. This offense has a mandatory sentence of imprisonment for life if the intent was to murder or kidnap, and imprisonment for 35 years if the intent is to maim, See Title 18, United States Code, § 956(a)(2),[27] so there is a huge deterrent effect arising from the statute.

Title 18, United States Code, § 956(b) prohibits conspiracies entered into in the United States to damage or destroy property that belongs to a foreign government and that is located in a foreign country with which the United States is at peace, so long as at least one co-conspirator engages in at least one overt act in furtherance of the conspiracy within the United States.[28] Section 956(b) requires a nexus to a nation with which the United States is at peace, as does § 960, but which is not required for prosecutions under § 956(a). The motive of the military expedition to a foreign nation is immaterial so long as at least two people enter into an agreement to damage property of a foreign government in that foreign country, the United States is at peace with that country, and at least one co-conspirator takes at least one overt action in the United States to accomplish the object of the agreement.[29] Like § 956(a), this provision implements the strategy to prevent private military expeditions by specifically prohibiting and punishing the inevitable consequences of a private military or naval expedition or enterprise. Insurgent-type military operations usually involve destroying or damaging buildings and/or property of the govern-ment against which the operation is directed, including railroads, canals, bridges, airports, airfields, or other public utilities, conveyances or structures, all of which specifically are within

the scope of § 956(b). The maximum punishment for a violation of this section is imprisonment for 25 years and a fine of $250,000, so the statute is a significant deterrent to a private military expedition.

There are two primary legal issues surrounding these laws. The first is what constitutes "a military or naval expedition or enterprise to be carried on from thence against the territory or dominion of a foreign prince or state."[30] The second is what constitutes "with whom the United States is at peace."[31] Traditional legislative principles provide that when Congress uses words of art in a new statute, or uses the same words in two different code sections, particularly if they are enacted the same day or are located in the same chapter of the same title of the United States Code, that those words have the same meaning in both places. Legislative drafting principles, as well as the reported cases, establish that the words, "with whom the United States is at peace," have the same meaning in § 956(b) as they do in § 960.

Military or Naval Expedition or Enterprise

This issue is not as clear as one may think. For instance, it is not a violation of § 960 to travel to a foreign country by one's self for the purpose of taking part in an existing insurgency against a government with which the United States is at peace.[32] Likewise, it is not a violation of § 960 to ship arms to a foreign country to assist an insurgency in that country.[33]

What then is a "military expedition or enterprise?"

> A military expedition is a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and

> its outfit; and that a military enterprise is martial undertaking, involving the idea of a bold, arduous and hazardous attempt.[34]

In Wiborg v. United States, the defendant was a Danish National who was the captain of a Danish merchant vessel. He entered into an agreement in Philadelphia to deliver a small company of men and ammunition to Cuba to fight in the Cuban Revolution against the Government of Spain. He sailed out the Delaware River and turned north into international waters off the coast of New Jersey. There he met with another merchant vessel in international waters, and took on board men and boxes of rifles and ammunition and two small boats. He then turned south and sailed to Cuba, along the coast of which he sailed for several days, before proceeding to Jamaica. While along the coast of Cuba, Wiborg off-loaded the company of men, along with the rifles and ammunition, which were in the boxes, in the two boats that he took on-board off the coast of New Jersey. Wiborg was convicted, and his conviction upheld by the United States Supreme Court. Several other criminal cases arose from this endeavor.[35]

In Jacobson v. United States,[36] a group entered into an agreement in Chicago to assist Germany against the United Kingdom in the First World War by inducing a revolution in India against the authority of the British government. In Jacobson, one co-conspirator went from Chicago to Japan to buy arms and ammunition to be taken to India.[37] Other co-conspirators went to India via Manila and Southeast Asia to train troops in India.[38] The defendants were convicted of conspiracy to violate the Neutrality Act, and their convictions upheld on appeal.

In United States v. Khan,[39] the defendants organized a military style training operation in the United States using paintballs as a tool to practice military tactics. The group planned to go to Kashmir and fight against the Indian government. Khan and at least two co-conspirators went to Pakistan and trained in a camp operated by Lashkar-e-Taiba ("LET"). Khan and others were convicted of violations of the Neutrality Act for their agreement to train and go to Kashmir as a team and engage in military actions against India. Their convictions were upheld on appeal.[40]

The resolution of what constitutes "at peace" is an extremely fact-intense determination. See for example, Mr. Justice Harlan's dissent in Wiborg, in which he concluded that the operation was not a military enterprise because it had no commanding officer; was a small group of people, no one of which was recognized as having authority over anyone else; and had the objective of reaching Cuba as individual people, not as a body, to engage in the civil war then ongoing.[41]

Federal trial and appellate courts have fleshed out somewhat the criteria to determine what constitutes a military or naval expedition. In United States v. Nunez,[42] the district judge stated that, "the essential features of military operations are evident enough. They are concert of action, unity of action, by a body organized and acting together, by means of weapons of some kind, acting under command, leadership."[43] The most comprehensive summary may be in United States v. Murphy.[44]

> Where a number of men, whether few or many, combine and band themselves together, and thereby organize

> themselves into a body, within the limits of the United States, with a common intent or purpose on their part at the time to proceed in a body to foreign territory, there to engage in carrying on armed hostilities, either by themselves or in cooperation with other forces, against the territory or dominions of any foreign power with which the United States is at peace, and with such intent or purpose proceed from the limits of the United States on their way to such territory, either provided with arms or implements of war, or intending and expecting and with preparation to secure them during transit, or before reaching the scene of hostilities, such case all the elements of a military enterprise exist.

See also United States v. The Mary N. Hogan,[45] United States v. The City of Mexico,[46] United States v. The Laurada,[47] and United States v. The Carondelet[48] for a discussion of cases forfeiting merchant vessels for having engaged in violations of the Neutrality Act.

With Whom the United States is at Peace

There is no clear statutory definition nor Supreme Court precedent controlling what constitutes "at peace" within the meaning of the Neutrality Act. In many of the cases brought under the Neutrality Act, or under Title 18, United States Code, § 856, there has not been any significant doubt regarding whether the United States was "at peace."

Historically, courts used to consider whether the United States was "at peace" to be a matter of law to be determined by the Court.[49] In 1995, however, the Supreme Court in United States v. Gaudin held that all elements of an offense had to be found by the jury unanimously beyond a reasonable doubt.[50] It now is without dispute that whether the United States is "at peace" with the nation involved in cases brought under §§ 960 and 956 is an element of those offenses, and that this issue must be submitted to the jury during trial unless

conceded by the defendant by way of stipulation. There are a significant number of reported court decisions over the years that taken together have developed a definition of the term “at peace.”

The rule that has emerged from these cases is that the United States is “at peace” with another nation for the purposes of §§ 960 and 956 if (1) there is no declared state of war between the United States and that nation, and (2) there are no active military actions between the United States and that nation.[51] Both conditions have to exist. If there is a formal state of war, then the United States is not “at peace” despite the absence of hostilities. Likewise, the United States is not at peace if there are active military actions with a nation despite the absence of a declaration of war.

A declared war is relatively easy to identify. The President asks Congress for a declaration of war, and Congress votes yes or no. The First World War and the Second World War were wars that were formally declared by Congress. There are several military actions in the past 50 years or so without formal declarations of war for which there is uniform agreement that the United States was “at war,” and therefore not “at peace. These include the Korean War and Vietnam, neither of which had the benefit of a formal declaration of war.[52] The Korean War did have the benefit of United Nations resolutions, however, and the Vietnam War did have the *Tonkin Gulf Resolution.*[53] In the *Tonkin Gulf Resolution*, Congress specifically stated that it “approved and supported the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and

to prevent further aggression, and that the United States regarded as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia."[54]

An undeclared war, where there exists a state of active military operation, is not as easy to identify. It is with regard to these operations that there is the most contention regarding whether the United States is "at peace." The most recent reported case on this issue is United States v. Chhun[55] from the Central District of California. In Chhun, the defendant was involved in a failed coup attempt against the Cambodian government in 2000. He was convicted of violations of Title 18, United States Code, §§ 960 and 956(b). Key issues in the Chhun case were whether the issue of "at peace" was a matter of law to be determined by the court, or an element of the offense to be determined by the jury, exactly what constitutes "at peace," and what evidence could be presented on that issue to the jury.[56]

Defendants normally take two approaches in these cases. The first is to argue that the United States is not at peace with whatever country is involved in order to rebut the government's allegation of being at peace because the United States allegedly is engaged in an undeclared war through covert action that involves significant active military operations.

The second approach taken by defendants in a high percentage of national security cases, i.e., espionage, terrorism, Neutrality Act violations, etc., is "greymail." Greymail occurs when a defendant seeks to disclose classified

information as part of his or her defense, requiring the government either to permit disclosure or dismiss the prosecution.[57]

The defendant in Chhun alleged that the United States was engaged in a covert war with Cambodia, and therefore the United States was not "at peace" with Cambodia so that the defendant could not be guilty as a matter of law. In furtherance of this approach, the defendant demanded discovery of secret government files regarding its military, intelligence and diplomatic relationship with Cambodia, and to introduce at trial evidence of alleged covert activities to establish the absence of peace with Cambodia. The United States sought to exclude evidence of covert action at trial as being irrelevant to the issue of being "at peace," and to prohibit discovery of secret government files as being unlikely to lead to admissible evidence that was relevant to some issue at trial.

The district court in Chhun II held that a declared or undeclared war must be open and notorious to establish that the United States is not at peace with a foreign nation.[58] "Active military operations are open and notorious. Covert operations, by definition, are not open and notorious. Therefore the United States' involvement in covert activities within a foreign nation does not establish a state of war such that the United States is not 'at peace' with the foreign nation."[59] As a result, the defendants were denied access to government files that might contain evidence of covert activities in Cambodia. Defendants also were denied authority to introduce evidence of alleged covert activities in Cambodia as being irrelevant to any issue in the case.[60]

At first blush, there is a case from the Southern District of Florida that appears to be in conflict with the rule stated above. In United States v. Terrell,[61] the district court held that the United States was not "at peace" with Nicaragua in the 1980s, so the Neutrality Act was not applicable. Upon further examination, however, it is clear that Terrell actually falls within the scope of the rule outlined above.

The court in Terrell chose to analyze the issue in terms of "neutrality," i.e., whether the United States is "at peace" with a nation is the same as whether the United States is politically "neutral." With great respect for the Court in the Southern District of Florida, this analysis is misplaced. "Neutrality" is a political term used in international relations theory to describe the status of alliances between states. Switzerland traditionally has been neutral, meaning not allied with any coalition in an international conflict. The question isn't whether a nation is neutral. The question is whether the nation is "at peace" with another nation. A nation could maintain a position of political neutrality with regard to another nation, yet not be "at peace" with that nation.

Likewise, the United States is not a "neutral" nation. The United States is a member of NATO, has other treaty obligations, and is a member of United Nations peacekeeping operations. That does not mean that the United States is not "at peace" with nations that are not a member of NATO. No one would seriously allege, for purposes of the Neutrality Act, that the United States is not "at peace" with Russia and all the members of the former Warsaw Pact. Accordingly, neutrality is not the correct analysis.

The Southern District of Florida's decision in Terrell otherwise is not in conflict with the Central District of California's decision in Chhun. In Terrell, the United States was involved in open and notorious military activities against Nicaragua. It was in the newspapers and on network television every day. Congress was openly appropriating funds for operations against the Sandinista government. On at least three separate occasions those military operations specifically were authorized and funded by Congressional enactments. This is a very different situation than the relationship between the United States and other nations with whom we are not engaged in open and notorious military action. Therefore, the court in Terrell concluded that the United States was not "at peace," with the government of Nicaragua

In today's world, the United States clearly is not at peace in Iraq or Afghanistan regardless of whether there has been a formal declaration of war. The United States is engaged in open and notorious military action in both countries, therefore the United States is not "at peace" in Iraq or Afghanistan, and the Neutrality Act should not be held to be applicable regarding those countries.

Terrell also was decided before the Supreme Court's decision in Gaudin in 1995, which clearly established that all elements of an offense have to be submitted to the jury, and found by the jury unanimously beyond a reasonable doubt. The court in Terrell took this issue away from the jury, and substituted it's own judgment for that of the jury as required by the Supreme Court. As a result, the holding in Terrell is of dubious validity. Even so, however, the decision in

Terrell is consistent with the decision in Chhun because the United States was involved in open and notorious military action in Nicaragua, which would have resulting in the same holding using the analysis set forth by the court in Chhun.

The analysis in Chhun is the approach that makes sense. The theory behind the Neutrality Act is that "a private individual's involvement in an armed attack on a foreign nation could trigger hostilities, as the foreign nation ... might conclude that it was sanctioned by the United States."[62] The risk that a foreign nation might attribute private action to the United States government and therefore initiate hostilities against the United States is eliminated if there already exists open and notorious military action by the United States against that foreign nation. "[I]t is the prerogative of the federal government, not private individuals" to take military action against a foreign nation."[63]

There are two Supreme Court cases discussing "at war" and "at peace" that do not disturb the rule stated above, but should be mentioned to demonstrate why they do not control resolution of this issue. They are not applicable because they interpret different provisions of federal law that were promulgated by Congress for very different reasons than the Neutrality Act. In addition, one of them interprets the term "at war" rather than "at peace."

"Congress in drafting laws may decide that the Nation may be 'at war' for one purpose, and 'at peace' for another. It may use the same words broadly in one context, narrowly in another."[64] In Lee v. Madigan,[65] the Supreme Court inter-preted a portion of the United States Code that provided that no person could be tried by courts-martial for murder or rape committed within the

geographic limits of the United States *in time of peace* (emphasis added). Defendant Lee was convicted by courts-martial in 1949 of conspiracy to commit murder, well after the close of hostilities of the Second World War, but also well before the wars with Germany and Japan formally were terminated by Joint Resolutions of Congress dated October 19, 1951 and April 28, 1952, respectively.[66] The Supreme Court determined that the courts-martial of Lee took place "in a time of peace" for the purposes of this particular statute despite the fact that the United States technically was at war until the Congressional Joint Resolutions a few years later. The Court found that in practical terms the United States was in a time of peace in 1949, and the important constitutional right to trial by jury outweighed application of the Articles of War, most of which already had been repealed by 1949.[67] As a result, the conviction by courts-martial was invalid, and the accused had to be convicted by a civilian court. The Supreme Court's decision in Lee v. Madigan is consistent with the above discussion in that open and notorious military action had ceased in 1945, and the United States was "at peace" in the everyday interpretation of that phrase. More importantly, the Court was not interpreting provisions of the Neutrality Act or related statutes.

In Ludecke v. Watkins,[68] the Supreme Court reached a seemingly inconsistent result in a case in which it interpreted a provision of the Alien Enemy Act[69] authorizing the United States to deport an enemy alien dangerous to the public peace and safety of the United States in a time of war. Ludecke defended, saying that hostilities had ceased in 1945, and therefore the Alien Enemy Act no

longer applied. The Supreme Court held that the authority began when war was declared but was not exhausted at the cessation of hostilities. A state of war technically still existed at the time of Ludecke's deportation.[70] While Ludecke appears to be inconsistent with Lee v. Madigan, it is consistent with the Neutrality Act cases. The most important factor to remember, however, is that the Supreme Court was interpreting a statute very different from the Neutrality Act.

Conclusion

In the constitutional form of government of the United States, the President is charged with conducting foreign affairs,[71] and the Congress is charged with the responsibility to raise Armies, to provide and maintain a Navy, and to declare war.[72] The President and Congress cannot allow the foreign policy of the United States to be determined by private parties, organizations and groups, or to allow those private parties to take actions that have the potential to commit the United States to war. The Neutrality Act and related statutes are one of the tools that the United States uses to implement its national security strategy of committing the United States to war only when authorized by Congress pursuant to its power under Article I, Section 8 of the Constitution.

Endnotes

[1] See, George Washington, *Annual Address to Congress*, December 3, 1793, cited in J. Richardson, 1 Messages and Papers of the Presidents, 131 (1896)("Washington, *Annual Address*"). See also, The Three Friends, 166 U.S. 1, 53, 17 S.Ct. 495, 498 (1897).

[2] United States v. Chhun, Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008). See also, Wiborg v. United States, 163 U.S. 632, 648, 16 S.Ct 1127, 1133-34 (1896); United States v. O'Brien, 75 F. 900 (S.D.N.Y. 1896); United States v. Nunez, 82 F. 599 (S.D.N.Y. 1896). See also, Lobel, Jules, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 Harvard Int'l L. J. 1, 6 (1982)("Lobel").

[3] Wiborg v. United States, 163 U.S. 632, 648, 16 S.Ct 1127, 1133-34 (1896).

[4] Id., See United States v. Duggan, 743 F.2d 59, 74 (2d Cir 1984)

[5] See United States v. Duggan, 743 F.2d at 74. See also *Senate Rept. No. 95-701*, at page 3999 (enacting the Foreign Intelligence Surveillance Act [FISA]); The Three Friends, 166 U.S. 1, 53, 17 S.Ct. 495, 498 (1897).

[6] United States v. Johnson, 952 F.2d 565, 572-3 (1st Cir. 1992); Lobel, at 6.

[7] United States v. Chhun, Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

[8] Id.

[9] See, Carlotta Gall and Eric Schmitt, *U.S. Questions Pakistan's Will to Stop Taliban*, New York Times, Friday, April 24, 2009, pp. A1, A8. "Yet Pakistani authorities deployed just several hundred poorly paid and equipped constabulary forces to Buner, who were repelled in a clash with the insurgents, … . The limited response set off fresh scrutiny of Pakistan's military, a force with 500,000 soldiers and a similar number of reserves." Id, at A1. The Pakistani response to actions of Taliban and *al Qaeda* operatives using its territory to train and harbor their military and terrorist forces also sets off scrutiny of the political leadership of Pakistan, and raises the risk of direct military intervention into Pakistan.

[10] Wiborg v. United States, 163 U.S. at 647, 16 S.Ct at 1133 (1896)

[11] Even with a large Irish-American population, and substantial domestic opposition to what is at least seen as oppressive treatment and discrimination against Catholics in Northern Ireland, the United States has been firm in not allowing its territory to be used by the Irish Republican Army and sympathizers to mount military or terrorist operations against the U.K. and the home govern-ment in Northern Ireland. See, for instance, United States v. McKinley, et al, 38 F.3d. 428 (9th Cir. 1994); United States v. Molle, Case No. 04-CR-323, U.S. District Court, E.D. VA, 2006 U.S. District Lexis 48749 (July 7, 2006); United States v. Johnson, et al, 738 F. Supp. 594 (D. Mass 1990).

[12] The full text of Title 18, United States Code, § 960 is as follows: Whoever, within the United States, knowingly begins or sets on foot or provides a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, will be fined under this title or imprisoned for not more than three years, or both

[13] Id. Although § 960 specifies that the maximum fine is $3,000, the alternative fines provision of Title 18, United States Code, § 3571 provides that except where Congress passes a statute after 1984 either increasing the existing fine, or imposing a new fine, the statutory fine for any felony will be $250,000. Congress is able under § 3571 to increase the fine for any given section above $250,000, or to pass a new statute with a fine above $250,000, but in the absence of such action all fines for felonies included in the United States Code as of 1984 were increased to $250,000.

[14] See Title 18, United States Code, § 371. The full text of § 371 is as follows: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned for not more than five years, or both.

[15] Jacobson v. United States, 272 F. 399, 402 (7th Cir. 1920).

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[16] Washington, *Annual Address*. See also, The Three Friends, 166 U.S. 1, 53, 17 S.Ct. 495, 498 (1897)

[17] Id.

[18] The full text of the relevant portion of § 5 of the Act of June 5, 1794 is as follows:
Sec. 5. Every person who, within the territory and jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on thence against the territory and dominions of any foreign prince or State, or of any colony, district or people, with whom the United States is at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.

[19] Id.

[20] See The Three Friends, 166 U.S. 1, 17 S.Ct at 498.

[21] The full text of Title 18, United States Code, §§956(a)(1) is as follows: Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided in subsection (a)(2).

[22] See Title 18, United States Code, § 1111(a).

[23] . United States v. Wharton, 320 F. 3d 526, 538 (5th Cir. 2003)

[24] United States v. Elliott, 266 F. Supp. 318, 323 (S.D.N.Y. 1967).

[25] 320 F. 3d 526 (5th Cir. 2003)

[26] Id., at 537-538

[27] 18 U.S.C. § 956 (a)(2): The punishment for an offense under subsection (a)(1) of this section is –
(A) imprisonment for any term of years or for life if the offense is conspiracy to murder or kidnap; and
(B) imprisonment for not more than 35 years if the offense is conspiracy to maim.

[28] The full text of Title 18, United States Code, § 956(b) is as follows: Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to damage or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, airport, airfield, or other public utility, public conveyance, or public structure, or any religious, educational, or cultural property so situated, shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be imprisoned for not more than 25 years. See also, United States v. Johnson, 952 F. 2d at 575-576.

[29] United States v. Elliott, 266 F. Supp. 318, 323 (S.D.N.Y. 1967)(defendant conspired to destroy a bridge in Zambia in order to halt the supply of Zambian copper on the world market, and cause the defendant to profit economically in the ensuing copper shortage).

[30] Title 18, United States Code, § 960.

[31] Id., and Title 18, United States Code, § 956(b)

[32] United States v. O'Brien, 75 F. 900, 903 (U.S.D.C., S.D.N.Y. 1896); United States v. Nunez, 82 F. 599 (S.D.N.Y. 1896)

[33] Id., at 907; United States v. Nunez, 82 F. 599 (S.D.N.Y. 1896). It is not always legal to ship arms to a foreign country; it's just not a violation of § 960. Congress filled this gap by implementing the Export Control Act, Title 22, United States Code, § 2778, which prohibits shipping certain arms such as automatic weapons, grenades, rocket propelled grenades, Stinger missiles, etc., or weapons grade technology, to a foreign country without an export permit from the Department of Commerce or Department of State. See also the federal regulations which implement § 2778, 22 C.F.R. §§ 121, 123, & 127.

[34] Wiborg v. United States, 163 U.S. at 650, 16 S.Ct at 1134 (1896). "For the purpose of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition." 163 U. 655. See also, United States v. Sander, 241 F. 417 (U.S.D.C., S.D.N.Y. 1917)

[35] See United States v. Hughs, 75 F. 267 (U.S.D.C., D. S.C. 1896); United States v. Hart, 78 F. 868 (U.S.D.C., E.D. PA 1897). But see, United States v. O'Brien, 75 F. 900, 903 (U.S.D.C., S.D.N.Y. 1896)(jury not able to agree on a verdict of guilty); United States v. Nunez, 82 F. 599 (S.D.N.Y. 1896)(jury not able to agree on a verdict of guilty).

[36] 272 F. 399, 402 (7th Cir. 1920). See also, United States v. Chakraberty, 244 F. 287 (U.S.D.C., S.D.N.Y. 1917)(Co-defendant of Jacobson prosecuted in the Southern District of New York rather than the Northern District of Illinois).

[37] Id.

[38] Id.

[39] 461 F.3d 477 (4th Cir. 2006)

[40] Id.

[41] Wiborg, 163 U.S. at 661-662.

[42] 82 F. at 601.

[43] Id.

[44] 84 F. 609, (U.S.D.C., D. Del. 1896).

[45] 18 F. 529 (U.S.D.C., S.D.N.Y. 1883)

[46] 28 F. 148 (U.S.D.C., S.D. Fla 1886)

[47] 85 F. 760 (U.S.D.C., D. Del 1898)

[48] 37 F. 799 (U.S.D.C., S.D.N.Y. 1889)

[49] See United States v. Terrell, 731 F. Supp. 473, 475-478 (S.D. Fla. 1989), as well as most of the cases from the late 19th century cited in the previous section.

[50] United States v. Gaudin, 515 U.S. 506, 511, 115 S.Ct. 2310 (1995).

[51] United States v. Chhun, 513 F. Supp.2d 1179, 1184 (C.D. Cal. 2007), as expanded by the court's subsequent order located at Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

[52] United States v. Terrell, 731 F. Supp. at 475

[53] Joint Resolution of Congress, H.J. RES 1145, August 7, 1964

[54] Id.

[55] 513 F. Supp.2d 1179, 1184 (C.D. Cal. 2007), as expanded by the court's subsequent order located at Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

[56] Id.

[57] United States v. Smith, 899 F. 2d 564, 565 (Sixth Cir. 1990)

[58] Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

[59] Id.

[60] Id.

[61] 731 F. Supp. 473, 475-478 (S.D. Fla. 1989)

[62] United States v. Chhun, 513 F. Supp.2d 1179, 1184 (C.D. Cal. 2007), as expanded by the court's subsequent order located at Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

[63] Id., at 3.

[64] Lee v. Madigan, 358 U.S. 228, 231, 79 S.Ct. 276, 278 (1959)

[65] Id.

[66] Id.

[67] Id.

[68] 335 U.S. 160, 68 S.Ct. 1429 (1948)

[69] Title 50, United States Code, § 21 (1948)

[70] 335 U.S. 160, 68 S.Ct. 1429

[71] United States Constitution, Art. II, Sections 1 and 2

[72] United States Constitution, Art. I, Section 8